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IN THE

SUPREME COURT OF THE UNITED STATES

.....TERM, 1976

No. 75-1224

GUARANTEE RESERVE LIFE
INSURANCE COMPANY
Plaintiff in Interpleader

WORLD MARKET CENTERS, INC., Bankrupt
Petitioner

v

JUNE D. HARDIN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v

JUNE D. HARDIN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, World Market Centers, Inc., acting through Ben M. Gilbert, Trustee in Bankruptcy, prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in that Court in the above entitled case, affirming the judgment of the United States District Court for the Western District of Oklahoma, sitting at Oklahoma City, Oklahoma.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Tenth Circuit is attached as Appendix A. The memorandum opinion of the United States District Court for the Western Division of Oklahoma, Oklahoma City Division, is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered November 10, 1975. Petitioner's petition for rehearing en banc was denied by Order dated January 15, 1976.

The Supreme Court's jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit is invoked pursuant to Title 28, U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

The petitioner, World Market Centers, Inc. (acting through Ben M. Gilbert, Receiver in a Chapter XI Reorganization under the Bankruptcy Act, and subsequently serving as Trustee in Bankruptcy), and respondent adversely claim ownership of a policy of insurance and its proceeds. The questions presented are:

1. Does the bankruptcy court have exclusive jurisdiction to determine whether the petitioner's claim of ownership is of the nature that gives the bankruptcy court summary jurisdiction to determine the merits of this controversy?

2. Does the District Court sitting in a plenary proceeding have jurisdiction to determine that summary jurisdiction does not exist in the bankruptcy court, and then determine the merits of the controversy in a plenary proceeding?

3. In affirming jurisdiction in the District Court, did the Court of Appeals improperly apply the jurisdictional tests prescribed by this Court and impose a new test which limits the jurisdictional grant to the Bankruptcy Court under the Bankruptcy Act?

4. Does the actual possession by the bankruptcy court of the policy of insurance give the bankruptcy court summary jurisdiction?

5. Does the possession of the proceeds of the insurance policy by the insurance company (at the institution of the Chapter XI proceeding), which is not asserting a claim to the proceeds, nor holding the proceeds as custodian for the respondent, give the bankruptcy court constructive possession of the proceeds and summary jurisdiction?

STATUTES AND RULES INVOLVED

§711. EXCLUSIVE JURISDICTION OF DEBTOR AND PROPERTY

"Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

STATEMENT OF THE CASE

On November 14, 1972, Guaranty Reserve Insurance Company filed its complaint in interpleader (Title 27 U.S. Code Federal Rules of Civil Procedure, Rule 22) alleging jurisdiction pursuant to Title 28 U.S. Code, Section 1332. Guaranty Reserve sought to interplead the proceeds of a $100,000.00 policy of insurance. Guaranty Reserve Insurance Company asked the District Court in a plenary proceeding to determine the respective rights of the petitioner and respondent to the policy of insurance and its proceeds. Guaranty Reserve Insurance Company asserted no adverse claim of ownership in the policy and its proceeds. The policy of insurance at all times was in the possession of the petitioner and the premium cost of the policy was paid by the debtor corporation.

The petitioner filed a motion to dismiss for lack of jurisdiction and a motion for change of venue, which motion contended that exclusive jurisdiction was in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, to determine whether the merits of this controversy should be determined under the summary proceedings of the Bankruptcy Act or in a plenary proceeding in the District Court. Until such determination was made by the Bankruptcy Court, there was no jurisdiction in the District Court to proceed in a plenary proceeding to determine the merits of the controversy.

On December 22, 1972, by order of the United States District Court, Western District of Oklahoma, the pe-

titioner's motion to dismiss for lack of jurisdiction and venue were overruled.

On January 23, 1973, Guaranty Reserve Life Insurance Company tendered into the registry of the United States District Court, proceeds of the policy of insurance in the amount of $100,000.00.

On July 25, 1973, the United States District Court entered its order granting interpleader to Guaranty Reserve Life Insurance Company. The petitioner's renewed motion to dismiss for lack of jurisdiction and venue was overruled.

The District Court proceeded to determine the merits of the controversy and on July 29, 1974, entered its judgment in favor of the respondent, from which judgment the petitioner took its appeal to the United States Court of Appeals for the Tenth Circuit.

The United States Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' affirmance of jurisdiction in the District Court in a plenary proceeding to determine that summary jurisdiction does not exist in the Bankruptcy Court conflicts with applicable decisions of this Court and with applicable decisions of the Court of Appeals for the Fourth Circuit, and the Fifth Circuit.

Title 11, U.S. Code, Section 711 (Section 311 of the Bankruptcy Act) confers exclusive summary jurisdiction in the United States Bankruptcy Court, Northern

District of Texas, to determine controversies with respect to property which at the time of the institution of the proceeding under Chapter XI of the Bankruptcy Act were either owned by the debtor, or in the actual or constructive possession of the Bankruptcy Court.

The District Court did not have Jurisdiction to determine the merits of the respondent's claim in a plenary proceeding. In *Cline v Kaplan*, 323 U.S. 97; 89 L.Ed 97; 65 S.Ct. 155 (1944), this Court held that the right of the respondent to proceed in a plenary proceeding is contingent upon a finding by the bankruptcy court that the respondent has a right to have the "merits of his claim passed on in a plenary suit and not summarily".

Cline v Kaplan, 323 U.S. at pp. 98, 99; 89 L.Ed at 99 held:

> A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *** If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated "in suits of the ordinary character, with the rights and remedies incident thereto" *** But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. *** It has both the power and the duty to examine a claim adverse to the bankruptcy estate to the extent of ascertaining whether the claim is ingenuous and substantial. *** Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the

> merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court. (Citations omitted.)

In *Taubel-Scott-Kitzmiller v Fox*, 264 U.S. 426, 433, 68 L.Ed. 770, 774; 44 S.Ct. 396, 399 (1924):

> "As every court must have power to determine in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive.

The Court of Appeals' holding is contra to *Katchen v Landy*, 382 U.S. 323, 327; 15 L.Ed. 2d 391; 86 S.Ct. 467 (1966):

> "The bankruptcy courts are expressly invested by statute with original jurisdiction to conduct proceedings under the Bankruptcy Act."

The District Court in a plenary proceeding is not vested with jurisdiction to determine whether the controversy was one under the Bankruptcy Act.

Exclusive jurisdiction is vested in the Bankruptcy Court to initially determine whether this controversy was or was not a proceeding under the Bankruptcy Act. Otherwise, the purposes of the act would be defeated.

In re Abraham, 421 F.2d 226, 227 (CA 5, 1970):

> Where the bankruptcy court seeks to exercise its summary powers, as opposed to independent plenary suit in district court, the bankruptcy court

itself has power to decide whether or not actual or constructive possession exists that is the basis of its summary jurisdiction.

> As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court. (Quoted from *Taubel-Scott-Kitzmiller Co., Inc. v Fox*, 264 U.S. 426, 433, 68 L.Ed. 770, 774, 44 S.Ct. 396, 399 (1924).)

In re Abraham, supra, the court adopted the language of *In re American Fidelity Corp., Ltd.*, 28 F. Supp. 462, 467 (S.D. Cal. 1939) which said:

> The bankruptcy court has summary jurisdiction to determine claims against title to, and liens upon property in the actual or constructive possession of the bankruptcy court by and through its officers, such as receivers and trustees, and by and through the bankrupt himself, whether that possession existed at the commencement of the bankruptcy proceeding or arose subsequently. This jurisdiction cannot be disturbed by the processes of other courts. All property in the actual or constructive possession of the bankrupt, in which he claims an interest, passes upon the filing of the petition in bankruptcy, into the custody of the bankruptcy court. To protect its jurisdiction from interference, that court may issue an injunction and determine, preliminarily, all questions concerning possession; and, for that purpose, may

> even go into the merits of the controversy to determine whether or no the bankruptcy court has acquired possession, actual or constructive.

The effect of the Court of Appeals' holding is to reinstitute the diminution of the estate by multiplicity of suits.

Through the guise of an interpleader suit, adverse claimants and creditors can attempt to remove selected properties from the equal sharing and priorities conferred by the Bankruptcy Act. The bankrupt estate is forced to fund expensive cumbersome plenary proceedings in state and federal courts.

In *Katchen v Landy*, 382 U.S. 323, 328, 329; 15 L. Ed. 2d 391, 396; S.Ct. 467, this Court defined the chief purpose of the Bankruptcy Act as follows:

> "[6] When Congress enacted general revisions of the bankruptcy laws in 1898 and 1938, it gave 'special attention to the subject of making [the bankruptcy laws] inexpensive in [their] administration.' HR Rep No. 1228, 54th Cong. 1st Sess, p. 2; HR Rep No. 1409, 75th Cong. 1st Sess. p. 2; S Rep No. 1916, 75th Cong., 3d Sess., p. 2. Moreover, this Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period,' Ex parte Christy, *3 How 292, 312, 11 L ed 603, 612, and that provision for summary disposition, 'without regard to usual modes of trial attended by some necessary delay,' is one of the means chosen by Congress to effectuate that purpose, Bailey v Glover, 21 Wall 342, 346, 22 L ed 636, 638."

The Court of Appeals' holding as to jurisdiction is as follows:

> "The policy itself is of no real consequence on this problem as the carrier had begun the interpleader suit seeking to deposit the proceeds with the court, and such deposit was made. The action was commenced by the insurance company. It was asserted that the trial court had jurisdiction under the general jurisdictional statutes. Rule 22, Fed.R.Civ.P., of course, provides for the particular type of suit. Thus with the commencement of the suit and the initial orders of the court, the 'property' was in the possession of the trial court. It never was in the possession, actual or constructive, of the company, the widow, or the Receiver. The fund was thus held by the court or the clerk, and against which they could assert their claims. The initial holding was adverse to both claimants and it would not be released until one of them asserted a superior right as part of, and during the course of, the proceedings contemplated. A similar adverse position was asserted or represented by the insurance company at the time it started the action, and by its commencement of the action."

The Court of Appeals improperly concluded that the property was the fund or proceeds. At the institution of the proceeding under Chapter XI, there was no fund or proceeds. Rather, there was a chose in action. The property in controversy was the debt owed by the insurance company to either petitioner or respondent.

Possession of the policy of insurance is possession of the chose in action. In *Murphy-Palmer Seeds, Inc.*

v Mert L. Mitchell, Trustee in Bankruptcy, 425 F2 705, 706, 707 (4 Cir., 1970), the court held in regard to a dispute between Trustee and adverse claimant to the proceeds of insurance policy, that the bankruptcy court had summary jurisdiction to determine the rights of the parties. The adverse claimant had instituted a prior proceeding in state court to establish a lien against the policy proceeds and garnish the proceeds of the policy held by the insurance companies. The Court of Appeals held:

> "[1-3] Murphy-Palmer's lien arose during the four month preference period of §60 of the Bankruptcy Act, 11 U.S.C. §96. Under §67(a)(4), 11 U.S.C. §107, therefore, the bankruptcy court has summary jurisdiction in a proceeding to determine the rights of the parties relative to the lien. See 1 Collier on Bankruptcy ¶2.06 at 158. *Furthermore, the insurance companies, at the time the voluntary petition was filed, held the proceeds of the bankrupt's policies, but made no claim to the proceeds. As a result, the bankruptcy court had 'constructive possession' of the property and, therefore, summary jurisdiction to determine claims to the property because it was within the court's 'custody'.* See 2 Collier on Bankruptcy ¶23.05. Finally (Emphases added)
>
> > where the matters in controversy are directly connected with the basic control of the bankruptcy court over the administration of the estate—such as determination of priorities, proof and allowance of claims, distribution of dividends, and the like
>
> action in nonbankruptcy forums is not warranted, except upon the express consent of the

> bankruptcy court. 1 Collier on Bankruptcy ¶2.07 at 159-168, 169 n. 33."

In re Estes 105 F.S. 761, 764 (N.D.Tex.1952) affr. 203 F2 313 (5 Cir., 1953) held in regard to jurisdiction to decide the controversy between the trustee and an adverse claimant to the proceeds of insurance policies:

> "[1, 2] The first point in this review questions jurisdiction for a summary proceeding on the trustee's application. The general rule is that the bankruptcy court may exercise summary jurisdiction in dealing with adverse claims to property in the actual or constructive possession of the court held as part of the estate, but cannot proceed summarily to determine a contest of property rights between the trustee in bankruptcy and an adverse claimant in possession of the disputed property, unless the contention of the adverse claimant is merely colorable, or unless said claimant by lack of objection or otherwise waives any question of summary jurisdiction. The trustee in this instance had possession of the insurance policy in question and the bankrupt is the insured therein named, although the loss payable provision makes Rapstine the payee to the extent of his interest. The thing in dispute is an intangible, a kind of chose in action, and eludes visible possession."

Texas by statute classifies the property as being the policy of insurance, and by statute Texas confers upon an intangible chose of action the classification of tangible property by providing in Tex.Rev.Civ.Stat.Ann. Art. 23(1) as follows:

> " 'Property' includes real and personal property, and life insurance policies and the effects thereof."

Possession of the policy of insurance by the bankruptcy court gave the bankruptcy court possession of the property and exclusive jurisdiction to determine the merits of the controversy in its summary proceedings.

The Court of Appeals found the property was the proceeds of the insurance. It further found that when the insurance company instituted its interpleader suit, possession of the proceeds were in the District Court. It held that the District Court holding was adverse to the petitioner and respondent.

In *Phelps v United States*, 421 US 330; 44 L.Ed.2 201, 95 S.Ct. 1728 this Court again restated the test of the summary jurisdiction of the bankruptcy court:

> "[3] The assignee claims no interest in the proceeds of $38,000. The Ninth Circuit of Appeals Wood Products Corp. held that that circumstances, without more, subjected property to the bankruptcy court's summary jurisdiction to enter a turnover order. Wood Products relied on the statement in Taubel-Scott-Kitzmiller v Fox, 264, US 426, 432-433, 68 L Ed 770, 44 S Ct 396 (1924), that constructive possession of the property by the bankruptcy court 'exists . . . where the property is held by some other person who makes no claim to it.' 483 F2d, at 976. That reliance is misplaced. The statement read in the context of the facts of that case and its holding applied only to property in the hands of a nonadverse third person who was not holding it as

> agent for a bona fide adverse claimant. Tauble itself held that the bankruptcy court had not been given jurisdiction by summary proceedings to avoid a lien created by levy under a judgment of a state court where the sheriff possessed the property for the judgment creditor, and neither he nor the judgment creditor had consented to adjudication of the controversy by the bankruptcy court. Similarly in this case, the United States is a bona fide adverse claimant to the $38,000 proceeds held by the assignee and has not consented to adjudication of its claim by the bankruptcy court."

It is clear that the Court of Appeals test confers a separate and independent ground in the respondent for a plenary proceeding. As set out in *Phelps v United States*, supra., and *Taubel-Scott-Kitzmiller v. Fox*, 264 U.S. 426, 432-433; 68 L Ed 770, 774; 44 S Ct 396 (1924):

> "Under that case law, an assignee for the benefit of creditors who held assets as 'a mere naked bailee for the creditors . . . has no right to retain the possession as against the trustee in bankruptcy.' In re McCrum, 214 F 207, 209 (1914). Here the assignee held as custodian for the United States, a bona fide adverse claimant. Galbraith v Vallely, supra."

Neither the insurance company nor the District Court held actual possession of the fund "as custodian" for the respondent.

At the institution of the proceeding under Chapter XI, the actual possession of the fund was in the insurance company, which made no claim to the funds, nor held the funds as custodian for the respondent.

If the fund or the proceeds of the policy are the property, they were in the constructive possession of the bankruptcy court.

The Court of Appeals has mistakenly set up a new test to determine the jurisdiction of the bankruptcy court, which test does not rely upon the rationale that it is the actual or constructive possession of the adverse claimant that gives the adverse claimant the right to have the merits decided in a plenary suit.

The Court of Appeals, on page 7 of its opinion, found as follows:

> "The Receiver in his brief, as the proof also indicates, states:
>
> " 'When the policy was issued by Guaranty Reserve Insurance Company, it was delivered by Mr. Davis to Brewer at the corporate offices. WMC agreed that Hardin could keep the portion of the $100,000 coverage for personal coverage provided he reimburse the company for the proportionate premium cost. Otherwise, Hardin was instructed, and agreed, to transfer the policy of ownership and beneficiary to WMC. Although . . . had repeated conversations with Hardin, he declined to keep any amount of the policy as personal coverage.'
>
> "Thus it appears at the time of his death the decedent had made no selection of the amount he wanted to keep. He had delayed doing so, and the separation also intervened."

Pursuant to this agreement, Mr. Hardin's ownership of the policy and its proceeds was predicated on his performance of two condition precedents, viz, se-

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lection of the amount and reimbursement of World Market Centers, Inc. for proportionate premium cost. Since these condition precedents were not performed by Milton A. Hardin prior to his death, ownership of the policy and its proceeds were in the debtor corporation. The Court of Appeals finding is tantamount to a finding that ownership was in the debtor at the institution of the proceeding under Chapter XI of the Bankruptcy Act. Again, ownership being in the debtor, the bankruptcy court had exclusive jurisdiction to determine the merits of this controversy in its summary proceeding pursuant to Title 11, U.S. Code, Section 711.

CONCLUSION

The Court of Appeals' error is twofold.

First, jurisdiction is exclusively vested in the bankruptcy court to initially determine whether the present proceeding was one within its summary proceedings. Thus the determination of the bankruptcy court's jurisdiction by a nonbankruptcy forum, "except on the express consent of the bankruptcy court", violates the statutory purpose of the Bankruptcy Act. Any overreaching by the bankruptcy court as to its jurisdiction is subject to review by its Court of Appeals and this Court. However, the interference with the bankruptcy court's statutory purposes by the process of other courts vitiates the purpose of the bankruptcy laws, which seek a "prompt and effectual administration and settlement of the estate of all bankrupts".

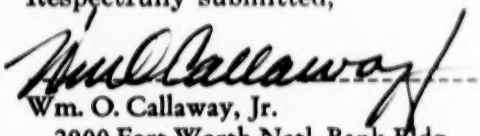
Secondly, the Court of Appeals applied a possessory test which conflicts with the statutory purpose of the Bankruptcy Act and this Court's constructions of the Act.

The right of a plenary proceeding is a right conferred on the claimant who asserts a pecuniary interest in the disputed asset. In cases where the adverse claimant has actual or constructive possession of the property at the institution of the proceeding under the Bankruptcy Act, the adverse claimant has the right to have the merits of his claim determined in state or federal plenary proceedings. It is his claim of interest in the property coupled with possession that gives him the right to elect to proceed in a plenary proceeding or consent to a summary proceeding. There is no right in a party who has possession but claims no property interest.

The District Court jurisdiction cannot be enhanced by its own possession after the commencement of the proceeding under the Bankruptcy Act. The District Court's jurisdiction to determine the merits in a plenary proceeding is conditioned upon the respondent's right to have the merits of her claim determined in a plenary proceeding. In case of the fund, if it be the property, the District Court's jurisdiction to determine the merits in plenary proceeding would only arise if the insurance company, which was possessor of the funds when the proceeding under the Bankruptcy Act was commenced, held these funds as cus-

todian for the respondent; thereby giving respondent a right to a plenary proceeding.

Respectfully submitted,



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APPENDIX A

[FILED NOV. 10, 1975
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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT]

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1881

GUARANTEE RESERVE LIFE
INSURANCE COMPANY,
Plaintiff in Interpleader,

v.

WORLD MARKET CENTERS, INC.
Defendant-Appellant,

JUNE D. HARDIN,
Defendant-Appellee.

Appeal From The
United States District Court
For The Western District
of Oklahoma
(D. C. # 74-795-D)

William O. Callaway, Jr., Garrett, Settle & Callaway, Fort Worth, Texas (Gene A. Castleberry, Castleberry

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& Lisle, Oklahoma City, Oklahoma, with him on the Brief), for Defendant-Appellant.

Eric J. Groves, Oklahoma City, Oklahoma (Jack T. Crabtree, Oklahoma City, Oklahoma, with him on the Brief), for Defendant-Appellee.

Before HILL, SETH and DOYLE, Circuit Judges.
SETH, Circuit Judge.

This action began as a federal interpleader suit filed in the Western District of Oklahoma by the Guarantee Reserve Life Insurance Company which named as defendants the parties to this appeal. The insurance company deposited the proceeds from a policy it had written on the life of Milton A. Hardin. His widow is one of the defendant-claimants. The other claimant is the Receiver for a corporation known as World Market Centers, Inc. The corporation at the time of suit was being administered under Chapter XI of the Bankruptcy Act in the Northern District of Texas. The decedent had been an officer of the corporation, and corporate funds had been used to pay the initial, and only, premium paid on the policy.

The trial court entered judgment awarding the proceeds of the policy to Mrs. Hardin, and the Receiver has taken this appeal. The issues raised on appeal include the assertion by the Receiver that the trial court was without jurisdiction because the bankruptcy court in Texas had summary jurisdiction by reason of the fact that the Receiver had succeeded

to posession of the life insurance policy itself. The Receiver also asserted that venue in Oklahoma was improper. On the merits, the appellant-Receiver argues that the policy belonged to and was for the corporation from the outset, and it was entitled to the proceeds.

The record shows that the decendent Hardin, James Brewer, and Joe Stevens were the officers and apparently the stockholders of the company. Brewer and Stevens initially each owned fifty per cent of the stock. The decedent, a Certified Public Accountant, was employed on a wekly salary on March 1, 1971, with an option to purchase stock. Decedent worked was employed on a weekly salary on March 1, 1971, when he left the company. During this time he was Secretary and Treasurer. The officers apparently decided to apply for "key man" insurance coverage on their lives. Applications were made for large policies, but were rejected. Other applications were then made for smaller amounts of coverage with no indication to the carriers that the policies were other than ordinary life policies with the named insured owning the policy and the wife as beneficiary. A number of applications were so made apparently because the total coverage sought would exceed the amount that would ordinarily be written by reason of the relatively modest salaries paid to the officers. One of the applications for $100,000 coverage on the life of the decedent Hardin was approved by Guarantee Reserve Life Insurance Company. This is the policy in issue, and it was written with the insured as the owner of

the policy, his wife the benficiary, and his children as contingent beneficiaries. The initial premium was paid with a check of the company signed by Brewer and the decedent. A similar policy or policies were written on the life of Brewer. The policy in question was issued on October 25, 1971, and was delivered by the writing agent to Brewer, the company president, at the company offices in November 1971. The policy apparently remained with the company papers at least until the decedent's death on February 2, 1972. The decedent had not requested possession of the policy.

A company check was submitted for the first year's premium with the application made late in 1971, as above described. The company records do not show how the expediture represented by the check was to be handled for accounting purposes. It did not appear as compensation for the decedent, no withholding was paid on it, it was not entered as relating to any accounts payable or receivable. The decedent filed no income tax returns before his death. His widow filed returns thereafter and the premium amount was not reflected thereon. Thus it would appear that the amount was not entered or charged on any particular company account.

At about the same time that the policy was delivered in November, some disagreement arose between the decedent and Brewer. On December 6th the employment of the decedent was terminated, and a termination agreement was executed which purported to cover the entire relationship. The policy however was not

mentioned specifically. The decedent was paid a lump sum of $25,000 on termination presumably for all claims.

Prior to his death the insured had prepared and signed a letter dated January 21st addressed to the Guarantee Life requesting that a $25,000 policy be issued to him "to replace the $100,000 policy number L4003597," which he therein authorized the company to cancel. This letter with decedent's check for a monthly premium was never sent to the company. The insurance company was also directed in the letter to refund premiums theretofore paid and unearned to World Market Centers.

The jurisdiction of the trial court will be considered first. As mentioned above, the Receiver asserts, as he did in the trial court, that summary jurisdiction was in the bankruptcy court by reason of the possession of the policy. The trial court denied the Receiver's motion as to jurisdiction, and we agree with its position. The policy itself is of no real consequence on this problem as the carrier had begun the interpleader suit seeking to deposit the proceeds with the court, and such deposit was made. The action was commenced by the insurance company. It was asserted that the trial court had jurisdiction under the general jurisdictional statutes. Rule 22, Fed.R.Civ.P., of course, provides for the particular type of suit. Thus with the commencement of the suit and the initial orders of the court, the "property" was in the possession of the trial court. It never was in the possession, actual or constructive, of the company, the widow, or the Receiver. The fund

was thus held by the court or the clerk, and against which they could assert their claims. The initial holding was adverse to both claimants and it would not be released until one of them asserted a superior right as part of, and during the course of, the proceedings contemplated. A similar adverse position was asserted or represented by the insurance company at the time it started the action, and by its commencement of the action. *See* Dannel v. Wilson-Weesner-Wilkinson Co., 109 F.2d 364 (6th Cir.); In re Herz Importing Corp., 349 F.Supp. 1106 (S.D.N.Y.); Glens Falls Insurance Co. v. Storm, 198 F.Supp. 450 (S.D. Calif.). The nature of the possession by the insurance company and by the clerk, and the relationship thereof to the Receiver, was sufficient to vest jurisdiction in the trial court as against the summary powers of the bankruptcy court. This is consistent with Katchen v. Landy, 382 U.S. 323, and Taubel-Scott-Kitzmiller Co. v. Fox., 264 U.S. 426.

The trial court on the merits held that the widow was entitled to the proceeds deposited in the interpleader action. We agree with this conclusion. This portion of the case is a fact question.

The application and the policy named the decedent as the owner of the policy and his wife was named as the beneficiary. No company interest appears thereon, but, of course, a company check was used to pay the initial premium. The time which elapsed between the date of application and decedent's termination was a matter of months, and, as indicated, the company accounts made no allocation of the expenditure.

(The Receiver in his brief, as the proof also indicates, states:)

> "When the policy was issued by Guaranty Reserve Insurance Company, it was delivered by Davis to Brewer, at the corporate offices. WMC agreed that Hardin could keep the portion of the $100,000 coverage for personal coverage, provided he reimbursed the company for the proportionate premium cost. Otherwise, Hardin was instructed, and agreed, to transfer the policy ownership and beneficiary to WMC. Although . . . had repeated conversations with Hardin, he declined to keep any amount of the policy as personal coverage."

"Thus it appears at the time of his death the decedent had made no selection of the amount he wanted to keep. He had delayed doing so, and the separation also intervened." Thus the position of the Receiver apparently is that no selection was made as could have been. However, the consequences of this inaction, considered with decedent's unsent letter to the insurance company, would indicate he had the entire amount as personal coverage until he chose a lesser amount.

The decedent certainly had a fiduciary duty to the company. Wilshire Oil Co. of Texas v. Riffe, 406 F.2d 1061 (10th Cir.); Lawson v. Haynes, 170 F.2d 741 (10th Cir.). In view of the way the transaction was handled we agree with the trial court that no breach of duty was shown sufficient to imply that the policy or proceeds were held in trust. The proof of the Receiver is for the most part negative, in that no entries were made as compensation, or debt or any-

thing else. But again in view of the time which elapsed, and the internal problems, it does not appear unreasonable for the expenditure to remain unallocated on the company books. The suggested explanation of the existence of a buy-back agreement covering company stock with the wives of the officers as offered by the Receiver was completely disbelieved and rejected by the trial court. The corporate president had signed the check, and the payment obviously was made by the company, but whether for, or how much for the corporate benefit was to be determined as shown by the quotation from appellant's brief appearing above. There was no failure to disclose. The record shows that each of two corporate officers owned fifty per cent of the stock when Hardin was hired, and he acquired his stock by option with the company.

The trial court started with what was evidenced on the face of the application and of the policy. The Receiver's evidence was not persuasive to overcome such indicia of ownership or right to the proceeds. The position of the decedent with the company, with the knowledge of all concerned, together with the fact the policy had been delivered to Brewer and was among the company records was not enough. The widow did not have the burden of proof initially nor did it pass to her. The trial court was required to balance the claims and indicia of ownership of the two defendants, and this it did.

As the conclusion of the trial court indicates, the decedent's ownership continued until his death and he had not then designated a lesser amount to be retained

personally or an amount for the company. The Receiver apparently makes no claim here that the company should be reimbursed for premiums advanced in view of the "selection" made by the decedent.

The trial court determined the facts, and we cannot say that it was in error.

AFFIRMED.

APPENDIX B

[FILED JUNE 25, 1974
REX B. HAWKS, CLERK, U. S. DISTRICT
COURT BY VERA EDDLMAN, Deputy.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 72-795-D Civil

GUARANTEE RESERVE LIFE
INSURANCE, COMPANY,
Plaintiff,
—vs—
JUNE D. HARDIN and
WORLD MARKET CENTERS, INC.,
Defendants.

MEMORANDUM OPINION

Plaintiff has interplead $100,000.00, the benefits of a life insurance policy it issued on the life of Milton Hardin (Hardin) as the insured. Hardin was the named owner of the policy. His wife, Defendant June D. Hardin, was the named beneficiary. Hardin became an employee, director and officer of World Market Centers, Inc. (WMC) in March, 1971. On October 26, 1971 the above policy was issued by Plaintiff. The first year premium was paid by WMC. The policy was brokered to Plaintiff by Harlan Thayne Davis (Davis), an insurance agent who served WMC. The policy when issued was delivered by the broker to the

President of WMC and it thereafter remained in company possession. On December 6, 1971 Hardin terminated from WMC. Hardin and WMC entered into a written termination agreement. The agreement made no mention of said policy of insurance. On February 8, 1972 Hardin died. Defendant June D. Hardin, as the named beneficiary, claims the policy benefits. WMC took bankruptcy on October 17, 1972 and its Trustee in Bankruptcy claims the policy benefits through the imposition of a constructive trust.

WMC had a general and apparently unofficial plan for "key-man insurance', i.e., life insurance covering three of its key officers. One was the President, Jim Brewer (Brewer), who owned one-half of the company, the other was Joseph Stephens (Stephens), who owned the other half of the company. The third official was Hardin who had become a Director, Secretary-Treasurer and Comptroller of the company. It appears that under this general plan WMC would pay the premiums for the key-man insurance and a part of the insurance was to be owned by and payable to the company as beneficiary and a part was to be owned by the insured and payable to the families of each of said company officials as beneficiaries of the policies.[1] There were no written official Board of

[1]In explanation of why his wife was the beneficiary of some life insurance, Brewer testified that he and Stephens had an agreement that some life insurance was to name their wives as beneficiaries on the basis that if one died his wife would receive the insurance benefits and would then deliver the company stock of her deceased husband to the company or other owner at no cost to the company or surviving owner. The Court does not believe this testimony for there was nothing produced in writnig to support such an agreement between Brewer and Stephens and it is unbelievable that prudent business men or even

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Director Resolutions or Minutes in this connection. It seems that the owners of the company merely agreed on the plan as controlling Board Members. The initial efforts to get $1,000,000.00 in life insurance for each Brewer and Stephens and $500,000.00 for Hardin failed. The applications were rejected. It was then agreed that an effort would be made by Davis to obtain insurance for them in $100,000.00 increments. Davis prepared and handled the several applications. Insurance was obtained for Brewer but apparently none for Stephens. It appears that Stephens left the company around this time. The Insurance obtained for Brewer was payable to his wife and family as beneficiaries. Several applications, at least three in number, were sent in by the broker for Hardin. In one (to Constitutional Life Insurance Company) the company was the owner and named beneficiary. In the application to Investors Life Insurance Company, June D. Hardin was the named beneficiary. In the application to the Plaintiff, Hardin was shown as the owner and his wife, Defendant June D. Hardin, was the named beneficiary. This was the only application

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less would have such an agreement, understanding or arrangement in which their wives and possibly their heirs would be vitally involved without reducing the same to an enforceable written contract. In addition, no insurance was even obtained on Stephens, he left the company and notwithstanding these facts apparently Brewer took no steps to eliminate his wife as a beneficiary of some of his life insurance, the premiums of which the company paid as in the case of Hardin.

It was brought to the Court's attention that Defendant June D. Hardin and her husband while he was an officer of the company personally guaranteed a company obligation which has resulted in a $30,000.00 judgment against her but there is no evidence before the Court that Plaintiff's insurance policy involved herein was either applied for or issued because of or as a result of this personal guaranty.

on Hardin which resulted in the issuance of a policy. Davis delivered this policy when issued to Brewer, the President of the Company, and said policy by reference to the attached Application showed Hardin to be the owner and his wife, Defendant June D. Hardin, as the beneficiary. Davis testified that he advised Brewer of such ownership and beneficiary when he delivered the policy. After Hardin terminated, some contacts were made between he and Davis about Hardin replacing the policy with a lesser amount of insurance. Apparently this would apply to future years as the premium had been paid for the first year. However nothing ever developed here. Sometime after termination, the company attempted to get Hardin to assign the policy to it, but this did not occur. The evidence reveals that Hardin was complaining about a $90.00 airplane ticket which he had paid for a trip which he claimed was for company business and which WMC refused to reimburse on the basis the trip was not on company business. Thus, when Hardin died he was the named owner and his wife was the named beneficiary of the policy. The premium for the first year, during which period Hardin died, had been paid by the company and the policy had been delivered to and was kept by the company at all times. Hardin or his representative, as he died before his return for 1971 was due, did not report such premium as income to him for tax purposes for 1971. Brewer, as above-stated, had life insurance in which his wife was the named beneficiary with the premiums therefor having been paid by the company.

The Oklahoma Supreme Court has defined a con-

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structive trust as being such as is, "raised by equity in respect of property which has been acquired by fraud, or where, though acquired without fraud, it is against equity that it should be retained by him who holds it." *Marshall* v. *Amos*, 471 P. 2d 896 at 905 (Okl. 1970).

The burden of proof is on one who seeks to establish a constructive trust. *Johnson* v. *Rowe*, P. 2d 955 (Okl. 1939).

In *State of Ohio* v. *Four Seasons Nursing Centers of Am., Inc.*, 465 F. 2d 25 (Tenth Cir. 1972), it was held in regard to the evidence required to establish a constructive trust as follows:

> "... The quantum of evidence required by Oklahoma for imposition of a constructive trust is substantial. Mere preponderance of the evidence is not sufficient to establish a constructive trust. Rather, it must be established by evidence which is clear, definite, unequivocal and satisfactory. The evidence must lead to but one conclusion, or leave no reasonable doubt as to the existence of the constructive trust."

The Court finds that the evidence does not establish fraud on the part of Hardin. The evidence fails to show that Hardin was guilty of fruad when the application for Plaintiff's policy was filled out and sent to Plaintiff. Davis, who was the insurance broker for WMC, testified to no fraud on the part of Hardin in the manner in which the Hardin applications were filled out nor did Brewer. The pattern of Hardin's wife being named as beneficiary therein followed the

same pattern as for Brewer. This was also in keeping with company policy where some insurance was to name the company as beneficiary but some insurance was to name the wife and family as beneficiaries. Here again as to the applications for insurance, this policy was followed by Davis on both Hardin and Brewer. Though the Court is at a loss to understand why the insurance policy was not dealt with by the parties when they entered into the Hardin termination agreement, there is no evidence of fraud on the part of Hardin which brought about this void.

After termination, it appears that there was a company request of Hardin for an assignment of the policy to the company but he did not assign the same, nor did he take for himself through the broker a policy in a lesser amount. Apparently he either had these matters under consideration, was not agreeable to the assignment or was awaiting settlement of his travel expense claim against the company which was in dispute. But, the evidence does not establish fraud on the part of Hardin either in the acquisition or retention of the policy in which his wife was the named beneficiary and for which the company paid the first year's premium at a time when he was a key employee of the company.

Finding no fraud, the Court still should consider under the circumstances if it is against equity that the policy proceeds should be retained by or paid to June D. Hardin, as named beneficiary of the policy.

In this connection, the Court finds and concludes that WMC has failed to meet its burden of proof

necessary to impose a constructive trust which as stated above is an onerous burden — a burden requiring evidence which is clear, definite, unequivocal and satisfactory — evidence which must lead to but one conclusion or leave no reasonable doubt as to the existence of the constructive trust.

In view of Hardin being a key employee of the company at the time the Application was forwarded, in view of company policy, practice and pattern of buying some life insurance on key employees in which their wives and families were to be the beneficiaries, in view of the insurance policy not being included or mentioned in the termination agreement and in view of the evidence of the discussions with the broker after termination about Hardin taking a lesser policy, the Court finds and concludes that WMC has failed to establish the existence of facts necessary to impose a constructive trust in its favor for the insurance benefits by clear, definite, unequivocal and satisfactory evidence and evidence which leads to but one conclusion or leaves no reasonable doubt as to the existence of the constructive trust.

Counsel for Defendant June D. Hardin will prepare an appropriate judgment based on the foregoing, submit the same to opposing counsel and then to the Court for signature and entry herein.

Dated this 25th day of June, 1974.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge